No. 2205

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of the Contempt of H. LOWNDES MAURY, Contemnor,

H. LOWNDES MAURY,

Plaintiff in Error,

vs.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY, a Corporation, and THE UNITED STATES OF AMERICA,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Montana.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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INDEX TO PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

H. LOWNDES MAURY, Butte, Montana, S. T. HOGEVALL and L. P. FORESTELL, 512–514 Call Building, San Francisco, California,
Attorneys for Plaintiff in Error.

In the District Court of the United States, District of Montana.

No. 401.

MYRTLE NORTHAM and HEDLEY NORTHAM, by MYRTLE NORTHAM, His Next Friend,
Plaintiffs,

vs.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY, a Corporation,
Defendant.

In re Contempt, H. L. MAURY, Contemnor.

BE IT REMEMBERED that on the seventeenth day of October, 1912, a statement of the Court and judgment of contempt was filed and entered herein as follows, to wit:

[Statement of Court and Judgment of Contempt.]

In the District Court of the United States, Ninth Circuit, District of Montana.

No. 401—AT LAW.

MYRTLE NORTHAM and HEADLEY NORTHAM, by MYRTLE NORTHAM, His Next FRIEND,

Plaintiffs,

vs.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY, a Corporation,

Defendant.

In re Contempt, H. L. MAURY, Contemnor.

THE COURT'S STATEMENT.

This cause came on to be heard the 10th day of October, 1912. It was and is an action for $35,000.00 damages, alleged to have arisen from injuries to the husband of one plaintiff and the father of the minor plaintiff, from neglect of defendant, and causing death.

With twelve men in the jury-box, counsel for plaintiff, Mr. H. L. Maury, proceeded to state, preliminary to examination on *voir dire,* the nature of the case to the jury, therein using the language hereinafter set out in the Court's recital of the facts made later in relation hereto; that in his opening statement to the jury said counsel used the language [1*] hereinafter set out in said recital accompanied by the circumstances therein disclosed; that on the

*Page-number appearing at foot of page of original certified Record.

11th day of October, 1912, and on conclusion of all the evidence and argument in the case, the Court instructed the jury and therein admonished them not to be in any wise influenced by the said language of said counsel; that immediately after the jury retired the Court admonished said counsel to remain, and thereupon the Court proceeded as follows, and the following proceedings were had, the Court's comments in larger part, that is, to the bottom of page 4 thereof, then being in writing and not filed herein, viz.: [2]

The COURT.—In order to perform the duty of the Court, in reference to the remarks referred to in the instructions, it is necessary to recite and make a record of the facts. When the jury was being empaneled and in his opening statement, counsel for plaintiff, Mr. H. L. Maury, made certain statements that the Court deems so clearly misconduct, and so grave in character, that they cannot be overlooked. Before questioning on *voir dire* the aforesaid counsel said to the jury: "I cannot win this case in Silver Bow County, so my questioning will be very particular." And in the course of his opening statement said counsel spoke as follows:

"Mr. MAURY.—And if we show you these facts, and if it is shown that Northam could not reasonably be expected in coming under that rock to know of its condition on that day on which he was killed, then are we entitled to a verdict at your hands, in favor of these plaintiffs and against the defendant. Lawyers usually close their statements of this kind that they expect a verdict at the hands of the jury. I do not

expect more than a hung jury here against the defendant. If this case were in Dillon, Helena, Billings, Missoula, I would—

"The COURT.—Mr. Maury, I think—

"Mr. STIVERS.—I except to the statement of the counsel—

"The COURT.—I think you are, putting it mildly, most disrespectful to the jury. These jurors are officers of the court and the court will not permit you to continue in any [3] such line of statement as that. Your duty, in the opening statement, is to state the facts you expect to prove, and not to go beyond that, so confine yourself to that.

"Mr. MAURY.—I except to the statement of the Judge.

"The COURT.—Proceed.

"Mr. MAURY.—This evidence will warrant and demonstrate that the plaintiffs are entitled to a verdict at your hands in an amount of twenty-five or thirty thousand dollars. I thank you very much."

The aforesaid language and the attitude, demeanor and tone of counsel was capable of and intended to bear but one construction, namely, that in the opinion of counsel, there were members of the jury who were of so poor a spirit, so lacking in manhood, that in spite of their oath to render a fair and impartial verdict, and in spite of their sworn freedom from bias and prejudice, they would either, from cowardice, fear of a powerful defendant, or desire to favor it, refuse to join in a verdict against the defendant, though such verdict was demanded by the facts and the law. And the design was apparent, and clearly to coerce

and intimidate the jury into finding a verdict for the plaintiffs whether warranted or not. Counsel evidently reasoned that if the jury were given to understand in advance that he held such a contemptuous opinion of them, they would be bound at any hazard to find for the plaintiff in order to demonstrate that counsel's opinion was erroneous, and in order to vindicate [4] themselves in the eyes of those who heard counsel's remarks, or who might hear of them. This was doubtless thought by counsel to be shrewd policy, and to make for his reputation for daring, if not courage.

It was more foolhardy than daring, and if courage, it would seem it was not the courage that springs from a brave and honest spirit, but that which is the offspring of a timid, overbearing and insolent one. For counsel impeached the honor and moral courage of these jurymen in open court, and while counsel was protected from their just resentment in word, if not in deed, by the sanctity of the court which counsel outraged, and by the jury's own respect for the dignity of the Court, counsel insulted them when they were helpless, as clearly as though he had used express language to make a direct charge, instead of indirectly making it by way of ugly insinuation. Counsel evidently thought that by indirection he could offend, and because of indirection, escape the consequences of that offending. That would seem to be the reverse of courage, and no zeal of counsel in a client's behalf can excuse, and little palliate.

Juries are part of the court, and entitled to protection by the Court. They must and will receive pro-

tection. If juries can be thus insulted, brow-beaten, intimidated and coerced by counsel, who are officers of the court, and with impunity, the office of juror would be feared, hated, despised, and jury service become contemptible; courts would [5] become a place for brawling, its administration of justice obstructed, and justice itself defeated.

The remarks of counsel were especially reprehensible in that he is a member of the legal profession and an officer of this court, sworn to uphold its dignity, to protect its honor, to aid it to do justice. He abused his office and violated his duty. Such conduct degrades the legal profession and incites others to deride the courts, to the infinite moral harm and loss of the entire people. And because language such as counsel's is offensive, calculated to intimidate and coerce jurors, and to obstruct and defeat justice, its indulgence in open court is misconduct in his office of attorney and counsellor of this court, and is contempt of court in the face of the court. It deserves and must receive condemnation and such action by the Court that the offense may be expiated, and counsel, and any others that might be tempted to follow his unfortunate example therein, deterred therefrom.

Mr. Maury, have you anything to say why the judgment of the Court, accordingly, should not be pronounced against you? [6]

Mr. MAURY.—Yes, your Honor, I have. The statement of fact is erroneous in one particular. I am speaking of the abstract exact facts of conduct. The first statement, before going into *voir dire,* was not in view of the fact that "I cannot win this case in

Silver Bow County, and therefore my questioning shall be somewhat elaborate," but it was in view of the fact that I believe I cannot win this case in Silver Bow County—"my questioning shall be elaborate." Thus much for that. That was the truth. I believe in standing before any and every court with a mind open, so that people may see what is therein, and I still believe that it is unfair to litigants against the Anaconda Copper Mining Company, or any of its associate concerns, to force them to trial, in this county. I have never changed my opinion as originally set forth in an affidavit on file in this court,—please turn the lights on, I have somewhat to say,—on file in this court. Nor will I change until results might change my mind.

The Federal Court in the State of North Carolina has refused to transfer a cause for trial against a popular congressman to the home of—the district wherein was the home of their congressman; and that decision was the reason why this case was originally commenced in Helena. This court transferred this case here to the home, not of a popular congressman, but to the home of a corporation which absolutely controls the destinies of ten thousand men in this community; and I felt, and I still feel, that there was an injustice done [7] to Myrtle Northam, and to Hedley Northam in that regard.

That is my feeling to-day as it has been ever since. I felt then that the Strangers' Court had passed from the Strangers' Court into a court where a stranger could not get exact justice,—equal justice, untrammeled justice. I felt that this court then was not up

to the standard set by the North Carolina Federal Court. I feel it yet. There is no use in concealing my feelings to the presiding officers of this court—to courts in general. No man yields higher respects than I do, and it is hearty; it is not that concealed, groveling, bowing boot-licking respect that some men who fawn around courts and judges pay; it is a respect which is acknowledged on all occasions, and without fear and without favor; but it is not that spirit which refuses to criticise, and then, when this District for jury service was fixed by the court, and a tremendous population in the control of this defendant, was placed in, with a very meager population not subject to this area of low barometric pressure in which we live, I felt that again this Court had not done what it knew or thought was unjust, but that an error had been committed,—a permanent error had been committed, which would work injustice in all such cases as this. And feeling that, I went into the trial of this case with a clouded spirit, a spirit that however we might strive, notwithstanding the fact that a judge of this court had previously held against these unfortunate plaintiffs, and that through great exertion and the expense of hundreds of dollars, they had taken an [8] appeal to a higher court and reversed that erroneous decision, which I think was due to that judge's coming in to this area of low barometric pressure.

I don't think he would have decided that case that way in Helena. I believe in mental influences that afflict men, that have no known cause, and even though that appeal had been taken at such terrific

delay and tremendous expense, I felt that we again faced a trial that would not be fair though this was the Strangers' Court. And to a man of historic study, a studious life, who looks back upon the period when this nation was young, and it was, as I believe conceived in liberty and justice, and knowing in my heart that the concept of them did not work out as they intended, that this court did not, in my opinion as a lawyer—others may differ from me—realize the ideals of the founders of this Government. It threw a pall upon my soul, for my soul does go into the interests of my clients. Misfortunes for myself I can stand, and have stood. The misfortunes of others go right to my heart, and sear and burn, and that does make me when I realize that their righteous interests are in desperate straits, take desperate measures with the ultimate object of gaining justice. That was the ultimate end here; and if this Court is above criticism, if any man in this nation is above criticism, I have greatly offended by this talk. If not—if as a citizen of this nation whose ancestors have sprinkled every battlefield with their blood,—who hold my lands in [9] Virginia under the Crown Grant of William and Mary, yet, if this nation has come to the point where any man or institution in it is above criticism, your Honor, then I am an offender against its customs and its laws. As to myself I care little. I don't even care for something that your Honor attributes to me, that I did not know I had,—a reputation for courage, or bravado, I believe your Honor termed it, or something like that. I never knew I had it. I

never sought it; I don't care for it; it is nothing to me. I go along—it is hard for me to practice law in a community where the situation is as I deem it to exist here, and as a majority of the lawyers at this bar deem it to exist. I am not the only one, though I may be more open and free in expressing my candid beliefs. You see, I have generations of freedom behind me. Hundreds of years we have been freemen in my native State, and we resent oppression, and I feel it here in this community, and it is not my nature to bow before any man and say he is better than I am. It is my nature to say he is my equal, but not my superior.

I have spoken at some length, your Honor. I did not expect to when I started. This matter was entirely unexpected to me, for the reason that no contempt was meant. If your Honor gained that impression, then it proceeded from something foreign to me, because, as I have said, I seek this court,—I file my cases here of choice and against this very defendant, and prefer this court to any other court, and my preference has grown greater in the last six or eight months because I [10] expect and receive ampler justice here than I received before the present incumbent took charge of this court. I am willing to abide by your Honor's decision in this matter. There is but one thing that I request,—that your Honor take this matter under advisement: Your Honor suffers somewhat like myself,—from being driven by haste in reaching rapid conclusions. We both have the same failing.

I have concluded, your Honor.

The COURT.—The Court will say that much, perhaps all, that counsel has said, no one will have any quarrel with. The difficulty is as set out in the Court's preceding statement, that you forgot that the time and place was not the time and place for the sentiments of which you delivered yourself to the jury. If, as you say, you made a motion in this case, or rather, you brought the case in Helena, and it was transferred here, and if, as you say, conditions are all that you claim they are, that does not touch the gist of your offending here. The Court is not disposed to be harsh with you. The Court has, however, considered this carefully and seriously from the time the incident occurred. Considering the standing you have at the bar, and in the community, it is deserving of more note from the Court than it would be if you were a tyro at the bar. You are counsel of years of learning and experience, and appreciate that there was an offense to the jury, and to the Court, and an offense to the opposing counsel, and an offense to yourself; and while the [11] Court believes that it might fittingly suspend you for an indefinite period from practice here, it will not do so, but it is the order of the Court that the aforesaid counsel, Mr. H. L. Maury, be fined in the sum of five hundred dollars, and be remanded to the custody of the marshal until such fine is paid, or he is otherwise discharged according to law. If a review hereof is desired in the Appellate Court, on motion, a reasonable stay will be granted for that purpose.

Mr. MAURY.—A review will be sought.

The COURT.—What time would you like to have, Mr. Maury?

Mr. MAURY.—I would like sixty days.

The COURT.—Very well.

Mr. MAURY.—And this sentence, your Honor, but confirms—

The COURT.—Mr. Maury, be very careful now. You have made your statement; it will be wise for you to not put yourself in a worse position. You have made your statement, and the Court will not hear further from you.

Thereupon, said counsel, Mr. H. L. Maury, timely took and was granted an exception, and ten days asked and granted for a bill of exceptions.

And thereupon the following entry and record thereof was made in the records of the Court, viz.: [12]

[Title of Court and Cause.]

[Judgment.]

In the Matter of Contempt of H. LOWNDES MAURY.

In Open Court—No. 401.

Whereas, on the 10th day of October, 1912, in open court, sitting in the county of Silver Bow, and in the presence of the Judge thereof, Honorable Geo. M. Bourquin, District Judge, presiding, during the session of said court, and while said court was engaged in its regular business, hearing and determining a certain cause pending before it, in which Myrtle Jones et al. were plaintiffs and the Boston & Montana Consolidated Copper & Silver Mining Company was defendant, one H. Lowndes Maury,

being an attorney at law and a member of the bar of this court, employed on the side of the plaintiffs in said cause, hath been and is guilty of a contempt of this Court, in using language contemptuous and disrespectful to the Court and jury engaged in the trial of said cause, that is to say, in using the following language in his examination of said jurors on *voir dire* and in his opening statement to the jury, to wit:

"MAURY (on *voir dire*).—I cannot win this case in Silver Bow County, so my questions will be very particular."

MAURY (in his opening statement).—" . . . . And if we show you these facts, and if it is shown that Northam could not reasonably be expected in coming in under that rock to know of its condition on that day on which he was killed, then are [13] we entitled to a verdict at your hands in favor of these plaintiffs and against the defendant. Lawyers usually close their statements of this kind that they expect a verdict at the hands of the jury. I do not expect more than a hung jury here against the defendant. If this case was in Dillon, Helena, Billings, Missoula, I would—

The COURT.—Mr. Maury, I think—

Mr. STIVERS.—I except to the statement of the counsel,—

The COURT.—I think you are, putting it mildly, most disrespectful to the jury. These jurors are officers of the court and the Court will not permit you to continue in any such line of statement as that. Your duty, in the opening statement, is to

state the facts you expect to prove, and not to go beyond that; so confine yourself to that.

Mr. MAURY.—I except to the statement of the Judge.

The COURT.—Proceed.

Mr. MAURY.—This evidence will warrant and demonstrate that the plaintiffs are entitled to a verdict at your hands in an amount of twenty-five or thirty thousand dollars. I thank you very much."

Which language was accompanied by an attitude, demeanor and tone on the part of said H. Lowndes Maury the whole of which was thereafter, as herein set out, found by the Court to be misconduct in office as an attorney and counsellor of this court of and by said H. Lowndes Maury, and found by said Court to constitute and be contempt of the Court, committed [14] in the face thereof.

And whereas, the said H. Lowndes Maury was thereafter, on this 11th day of October, 1912, in open court, and immediately after the submission of said cause to the jury, required by the Court to answer for the said contempt.

And thereupon the Court stated the facts constituting said misconduct and contempt, for a record thereof to be duly filed, and adjudged the same to be misconduct and contempt.

And thereupon the Court asked said H. Lowndes Maury if he had aught to say why judgment accordingly should not be pronounced, and the said H. Lowndes Maury addressed the Court. And the Court holding no reason had been shown, proceeded

to judgment and sentence as follows, to wit:

Now, therefore, it is considered, ordered and adjudged by the Court that the said H. Lowndes Maury, by reason of said acts, was and is, guilty of a contempt of this Court, and that for such, his contempt aforesaid, he, the said H. Lowndes Maury, do pay a fine of Five Hundred Dollars ($500.00), and be remanded into the custody of the United States Marshal for the District of Montana until said fine is paid or he is otherwise discharged according to law.

And thereupon, on motion duly made, a stay of execution was granted herein for the period of sixty days.

And the foregoing are all the proceedings herein.

Dated October 17, 1912.

GEORGE M. BOURQUIN,
Judge.

(Filed Oct. 17, 1912. Geo. W. Sproule, Clerk. By Harry Drumm, Deputy).

And thereafter to wit, on November 21st, 1912, a petition for writ of error was filed herein, being as follows, to wit: [15]

In the District Court of the United States, in and for the District of Montana.

No. 401—AT LAW.

MYRTLE JONES and HEDLEY NORTHAM, by MYRTLE JONES, His Guardian ad Litem,
Plaintiffs,

vs.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY, a Corporation.

Defendant.

In re Contempt, H. L. MAURY, Contemnor.

Petition for a Writ of Error.

To the Honorable the Judges of said Court:

Now comes H. Lowndes Maury, and says:

That on the 11th day of October, 1912, at the September term, 1912, of the District Court of the United States, in and for the District of Montana, a judgment final in its nature as to the said District Court was rendered and entered in favor of the United States of America in the above-entitled cause and against said Maury, wherein it was adjudged that said Maury be fined in the sum of five hundred ($500.00) dollars, and be remanded to the custody of the marshal until such fine is paid, or he is otherwise discharged according to law; and in which said judgment and the record of proceedings had prior thereto in said cause certain manifest errors have intervened to the great prejudice of said Maury, which errors are specified in detail in the assignment of errors which has [16] been filed in the said District Court:

Wherefore, the said H. Lowndes Maury, feeling himself aggrieved by the said judgment of the Court below rendered thereon and entered herein, comes now H. Lowndes Maury and petitions said Court for an order allowing said H. Lowndes Maury to prosecute a writ of error to the Honorable the United

States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided for the correction of the errors so complained of, and also that an order be made fixing the amount of bail which the said Maury shall give and furnish in the said District Court upon said writ of error, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals, and the said H. Lowndes Maury herewith presents his assignment of errors in accordance with the rules of the United States Circuit Court of Appeals and the course and practice of this Honorable Court.

And your petitioner will ever pray.

H. LOWNDES MAURY,
Attorney for Himself.

(Filed Nov. 21, 1912. Geo. W. Sproule, Clerk.)

And thereafter, to wit, on November 21st, 1912, assignment of errors was filed herein, which is entered of record as follows, to wit: **[17]**

In the District Court of the United States in and for the District of Montana.

No. 401—AT LAW.

MYRTLE JONES and HEDLEY NORTHAM, by MYRTLE JONES, His Guardian ad Litem,
Plaintiffs,

vs.

BOSTON AND MONTANA CONSOLIDATED

COPPER AND SILVER MINING COMPANY, a Corporation,

Defendant.

In re Contempt, H. L. MAURY, Contemnor.

Assignment of Errors.

H. L. Maury, in this action, in connection with his petition for a writ of error, makes the following assignment of errors, which he avers occurred in this matter, and in the proceedings leading up to the final judgment, to wit:

1.

The Court erred in rendering its judgment in the proceedings herein, a day and a night having elapsed since the speaking of the words claimed to be contemptuous and the rendering of judgment by the Court.

2.

The Court erred in rendering judgment herein. In this the Court was without jurisdiction to summarily punish for contempt.

3.

The Court had no jurisdiction to punish for contempt [18] herein without filing written charges, or giving notice, or without a citation.

4.

The evidence is insufficient to sustain the judgment of the Court.

5.

The action of the Court herein was erroneous. The words spoken were not contemptuous under any reasonable construction.

6.

The words spoken were true, and therefore not contemptuous.

7.

The Court erred herein in not giving H. L. Maury an opportunity to defend himself by way of preparing a defense or offering evidence.

8.

The judgment of the Court and punishment assessed by the Court is excessive, unusual and cruel.

WHEREFORE, and for divers other reasons appearing in said record and proceedings, said H. Lowndes Maury, plaintiff in error, prays that said judgment be reversed and that he be discharged, and that the proceedings be dismissed.

H. LOWNDES MAURY,
Attorney for Himself.

(Filed Nov. 21, 1912. George W. Sproule, Clerk.)

And thereafter, to wit, on November 21st, 1912, an order allowing writ of error was filed and entered herein, being as follows, to wit: [19]

In the District Court of the United States in and for the District of Montana.

No. 401—AT LAW.

MYRTLE JONES and HEDLEY NORTHAM, by MYRTLE JONES, His Guardian ad Litem,

Plaintiffs,

vs.

BOSTON AND MONTANA CONSOLIDATED

COPPER AND SILVER MINING COMPANY, a Corporation,

Defendant.

In re Contempt, H. L. MAURY, Contemnor.

Order Allowing Writ of Error, etc.

This 21st day of November, 1912, came the above-named H. Lowndes Maury, and filed herein and presented to the Court his petition praying for the allowance of a writ of error intended to be urged by him, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and that such other and further proceedings may be had as may be proper in the premises; and that pending the final decision of the said Circuit Court of Appeals, H. Lowndes Maury be released on his own recognizance.

On consideration where, the Court does allow the writ of error, and that the said Maury be let at his liberty to bail until the final determination of the said error proceedings by the said Circuit Court of Appeals.

GEO. M. BOURQUIN,
Judge.

(Filed and entered Nov. 21, 1912, Geo. W. Sproule, Clerk.)

And thereafter, to wit, on November 21st, 1912, a writ of error was duly issued herein, and thereafter, on December 2d, 1912, filed herein, being as follows, to wit: [20]

In the Circuit Court of Appeals of the United States, Ninth Circuit.

No. 401—AT LAW.

MYRTLE JONES and HEDLEY NORTHAM, by MYRTLE JONES, His Guardian ad Litem,
Plaintiffs,

vs.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY, a Corporation,
Defendant.

In re Contempt, H. L. MAURY, Contemnor.

Writ of Error.

United States of America—ss:

The President of the United States to the Honorable Judge of the District Court of the United States, in and for the District of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of judgment that H. Lowndes Maury be fined in the sum of five hundred ($500.00) dollars, and remanded to the custody of the Marshal until the said fine be paid, or he be otherwise discharged according to law in a certain action pending before you, wherein Myrtle Jones and Hedley Northam by Myrtle Jones, his guardian *ad litem,* plaintiffs, and the defendant is Boston and Montana Consolidated

Copper and Silver Mining Company, a corporation, a manifest error hath happened to the great damage of H. Lowndes Maury, as by his petition for writ of error appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to H. Lowndes Maury aforesaid in this behalf do [21] command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within thirty days from the date hereof; and that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals, for the Ninth Circuit, may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable GEO. M. BOURQUIN, Judge of the United States District Court, District of Montana, the 21st day of November, in the year of our Lord one thousand nine hundred and twelve.

[Seal] GEO. W. SPROULE,

Clerk of the District Court of the United States for the District of Montana.

Service of the above and foregoing writ of error admitted and copy received this —— day of November, 1912.

_____,
_____,
_____,

Attorneys for Defendant in Error, Boston and Montana Consolidated Copper and Silver Mining Company.

_____,
_____,
_____,

Attorneys for Defendant in Error, United States of of America. [22]

Return to Writ of Error.

ANSWER OF COURT TO WRIT OF ERROR.

The answer of the Honorable the District Judge of the United States, in and for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is made, with all things touching the same, I certify under the seal of said District Court to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within I am commanded.

By the Court.

[Seal] GEO. W. SPROULE,
Clerk. [23]

[Endorsed]: No. 401—At Law. In the Circuit Court of Appeals of the United States, Ninth Circuit. Myrtle Jones and Hedley Northam, by Myrtle

Jones, His Guardian ad Litem, Plaintiffs, vs. Boston and Montana Consolidated Copper and Silver Mining Company, a Corporation, Defendant. Writ of Error. In re Contempt, H. L. Maury, Contemnor. Filed Dec. 2, 1912. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 21st day of November, 1912, a citation was duly issued herein, and thereafter, on December 2d, 1912, filed herein, being as follows, to wit: [24]

In the District Court of the United States in and for the District of Montana.

No. 401—AT LAW.

MYRTLE JONES and HEDLEY NORTHAM, by MYRTLE JONES, His Guardian ad Litem,
Plaintiffs,

vs.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY, a Corporation,
Defendant.

In re Contempt, H. L. MAURY, Contemnor.

Citation.

United States of America,—ss:

The President of the United States to Boston and Montana Consolidated Copper and Silver Mining Company, and to the United States of America, Greeting:

You and each of you are hereby cited and ad-

monished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco in said circuit, within thirty days from the date hereof pursuant to a writ of error filed in the clerk's office of the District Court of the United States of the District of Montana, wherein H. Lowndes Maury is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

In granting this citation, it is the opinion of the Judge that the above-named defendant is no wise interested in the review contemplated, but the form presented by counsel is accepted, to the end that every right his or by him deemed to be his may be protected. [25]

WITNESS the Honorable GEORGE M. BOURQUIN, Judge of the District Court of the United States, this 21st day of November, in the year of our Lord One Thousand Nine Hundred and Twelve.

GEO. M. BOURQUIN,
Judge.

Service upon us this —— day of November, 1912, of the foregoing citation is hereby admitted.

_____,
_____,
_____,
Attorneys for Defendant in Error, Boston and Montana Consolidated Copper and Silver Mining Company.

_____,
_____,
_____,
Attorneys for Defendant in Error, United States of America. [26]

[Endorsed]: No. 401—At Law. In the District Court of the United States, in and for the District of Montana. Myrtle Jones and Hedley Northam, by Myrtle Jones, His Guardian ad Litem, Plaintiffs, vs. Boston and Montana Consolidated Copper and Silver Mining Company, a Corporation, Defendant. In re Contempt, H. L. Maury, Contemnor. Citation. Filed Dec. 2, 1912. Geo. W. Sproule, Clerk. [27]

In the District Court of the United States in and for the District of Montana.

United States of America,
District of Montana,—ss.

[Certificate of Clerk U. S. District Court to Record, etc.]

I, George W. Sproule, Clerk of the United States District Court, in and for the District of Montana, do hereby certify and return to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 28 pages, numbered consecutively from one to 28, inclusive, is a true and correct transcript of the pleadings, processes, records, orders, judgment and all other proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my custody and control; and I do further certify and return that I have annexed to said transcript and included within said paging, original citation and writ of error; and I further certify that the costs of the transcript of the record is the sum of $10.35 (Ten 35/100 Dollars), and that the same have been paid.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Butte, Montana, this 5th day of December, 1912.

[Seal] GEO. W. SPROULE,
Clerk. [28]

[Endorsed]: No. 2205. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Contempt of H. Lowndes Maury, Contemnor. H. Lowndes Maury, Plaintiff in Error, vs. Boston and Montana Consolidated Copper and Silver Mining Company, a Corporation, and The United States of America, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed December 9, 1912.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2205.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Contempt of
H. LOWNDES MAURY,
Contemnor.

H. LOWNDES MAURY,
Plaintiff in Error,

vs.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY, a Corporation, and THE UNITED STATES OF AMERICA,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

Upon writ of Error to the United States District Court of the District of Montana, Hon. George M. Bourquin, presiding.

STATEMENT OF THE CASE.

On the 10th day of October, 1912, there was called for trial in the district court, and the trial was commenced therein, a cause at law, Hedley Northam and another against Boston & Montana Consolidated Copper and Silver Mining Company, a corporation, an action for damages for death of John Northam, the father of one of the plaintiffs, the husband of the other plaintiff.

The alleged contemnor, H. Lowndes Maury, a member of the bar of the nisi prius court and of the appellate court, was of counsel for the plaintiffs. Before going into the *voir dire,* the said Maury stated to twelve men of the panel whose names had been first drawn (according to the court's record, which must control of course in the court of appeals), I cannot win this case in Silver Bow County so my questioning will be very particular." Note well that while the record of the court is controlling upon the upper court, a proposition which we cannot deny, yet wherever this record does not state the fact we shall still set forth the truth. Counsel actually said, "In view of the fact that I believe I cannot win this case in Silver Bow County my questioning shall be elaborate." 7 R. 3.

The cause was being tried in the city of Butte in the county of Silver Bow. The trial proceeded and a jury was empaneled. The alleged contemnor then proceeded to make an opening statement of what he

expected to prove on behalf of the plaintiffs, and then used the following language:

> "And if we show you these facts, and if it is shown that Northam could not reasonably be expected in coming under that rock to know of its condition on that day on which he was killed, then are we entitled to a verdict at your hands in favor of these plaintiffs and against the defendant. Lawyers usually close their statements of this kind that they expect a verdict at the hands of the jury. I do not expect more than a hung jury here against the defendant. If this case were in Dillon, Helena, Billings, Missoula, I would—" 3 R. 20 to 4 R. 3.

The court then interrupted: "Mr. Maury, I think"—Opposing counsel interrupted, "Mr. Stivers: I except to the statement of counsel." The court continued: "The court: I think you are, putting it mildly, most disrespectful to the jury. These jurors are officers of the court and the court will not permit you to continue in any such line of statement as that. Your duty in the opening statement is to state the facts you expect to prove and not to go beyond that, so confine yourself to that." Mr. Maury: "I except to the statement of the judge." The court: "Proceed." Mr. Maury: This evidence will warrant and demonstrate that the plaintiffs are entitled to a verdict at your hands in an amount of twenty-five or thirty thousand dollars. I thank you very much." 4 R.

The trial proceeded without further mention by the court or counsel of the incident until the charge of the court to the jury at its conclusion on the next day. Mention was made of the incident in the charge by the presiding judge. After the charge, when the jury had retired, as Mr. Maury was leaving the court room, the court directed him to remain, and thereupon, without further notice or citation or time being allowed to present a defense, the court spoke as follows:

> "THE COURT: —In order to perform the duty of the Court, in reference to the remarks referred to in the instructions, it is necessary to recite and make a record of the facts. When the jury was being empaneled and in his opening statement, counsel for plaintiff, Mr. H. L. Maury, made certain statements that the Court deems so clearly misconduct, and so grave in character, that they cannot be overlooked. Before questioning on *voir dire* the aforesaid counsel said to the jury: 'I cannot win this case in Silver Bow County, so my questioning will be very particular.' And in the course of his opening statement said counsel spoke as follows:
>
> 'Mr. Maury:—And if we show you these facts, and if it is shown that Northam could not reasonably be expected in coming under that rock to know of its condition on that day on which he was killed, then are we entitled to a verdict at your hands, in favor of these plaintiffs and against the

defendant. Lawyers usually close their statements of this kind that they expect a verdict at the hands of the jury. I do not expect more than a hung jury here against the defendant. If this case were in Dillon, Helena, Billings, Missoula, I would—

'The Court.—Mr. Maury, I think —

'Mr. Stivers.—I except to the statement of the counsel—

'The Court.—I think you are, putting it mildly, most disrespectful to the jury. These jurors are officers of the court and the court will not permit you to continue in any such line of statement as that. Your duty, in the opening statement, is to state the facts you expect to prove, and not to go beyond that, so confine yourself to that.

'Mr. Maury.—I except to the statement of the Judge.

'The Court.—Proceed.

'Mr. Maury.—This evidence will warrant and demonstrate that the plaintiffs are entitled to a verdict at your hands in an amount of twenty-five or thirty thousand dollars. I thank you very much.'

The aforesaid language and the attitude, demeanor and tone of counsel was capable of and intended to bear but one construction, namely, that in the opinion of counsel, there were members of the jury who were of so poor a spirit, so lacking in manhood, that in spite of their oath to render

a fair and impartial verdict, and in spite of their sworn freedom from bias and prejudice, they would either, from cowardice, fear of a powerful defendant, or desire to favor it, refuse to join in a verdict against the defendant, though such verdict was demanded by the facts and the law. And the design was apparent, and clearly to coerce and intimidate the jury into finding a verdict for the plaintiffs whether warranted or not. Counsel evidently reasoned that if the jury were given to understand in advance that he held such a contemptuous opinion of them, they would be bound at any hazard, to find for the plaintiff in order to demonstrate that counsel's opinion was erroneous, and in order to vindicate themselves in the eyes of those who heard counsel's remarks, or who might hear of them. This was doubtless thought by counsel to be shrewd policy, and to make for his reputation for daring, if not courage.

It was more foolhardy than daring, and if courage, it would seem it was not the courage that springs from a brave and honest spirit, but that which is the offspring of a timid, overbearing and insolent one. For counsel impeached the honor and moral courage of these jurymen in open court, and while counsel was protected from their just resentment in word, if not in deed, by the sanctity of the court which counsel outraged, and by the jury's own respect for the dignity of

the Court, counsel insulted them when they were helpless, as clearly as though he had used express language to make a direct charge, instead of indirectly making it by way of ugly insinuation. Counsel evidently thought that by indirection he could offend, and because of indirection, escape the consequences of that offending. That would seem to be the reverse of courage, and no zeal of counsel in a client's behalf can excuse, and little palliate.

Juries are part of the court, and entitled to protection by the Court. They must and will receive protection. If juries can be thus insulted, browbeaten, intimidated and coerced by counsel, who are officers of the court, and with impunity, the office of juror would be feared, hated, despised, and jury service became contemptible; courts would become a place for brawling, its administration of justice obstructed, and justice itself defeated.

The remarks of counsel were especially reprehensible in that he is a member of the legal profession and an officer of this court, sworn to uphold its dignity, to protect its honor, to aid it and do justice. He abused his office and violated his duty. Such conduct degrades the legal profession and incites others to deride the courts, to the infinite moral harm and loss of the entire people. And because language such as counsel's is offensive, calculated to intimidate and coerce jurors,

and to obstruct and defeat justice, its indulgence in open court is misconduct in his office of attorney and counsellor of this court, and is contempt of court in the face of the court. It deserves and must receive condemnation and such action by the Court that the offense may be expiated, and counsel, and any others that might be tempted to follow his unfortunate example therein, deterred therefrom."

And thereupon, to the oral charges of the court, Mr. Maury spoke as follows, with the exception of one typographical error, R. page 9, line 22, the record appears "whose ancestors have sprinkled every battle field with their blood." The words spoken were "whose ancestors have sprinkled her early battlefields with their blood":

"Mr. Maury: Yes, your Honor I have. The statement of fact is erroneous in one particular. I am speaking of the abstract exact facts of conduct. The first statement, before going into *voir dire,* was, not in view of the fact that 'I cannot win this case in Silver Bow County, and therefore my questioning shall be somewhat elaborate,' but it was in view of the fact that 'I believe I cannot win this case in Silver Bow County—my questioning shall be elaborate.' Thus much for that. That was the truth. I believe in standing before any and every court with a mind open, so that people may see what is therein, and I still

believe that it is unfair to litigants against the Anaconda Copper Mining Company, or any of its associate concerns, to force them to trial, in this county. I have never changed my opinion as originally set forth in an affidavit on file in this court,—please turn the lights on, I have somewhat to say,—on file in this court. Nor will I change until results might change my mind.

The Federal Court in the State of North Carolina has refused to transfer a cause for trial against a popular congressman to the home of—the district where was the home of this congressman; and that decision was the reason why this case was originally commenced in Helena. This court transferred this case here to the home, not of a popular congressman, but to the home of a corporation which absolutely controls the destinies of ten thousand men in this community; and I felt, and I still feel, that there was an injustice done to Myrtle Northam, and to Hedley Northam in that regard.

That is my feeling today as it has been ever since. I felt then that the Strangers' Court had passed from the Strangers' Court into a court where a stranger could not get exact justice,—equal justice, untrammeled justice. I felt that this court then was not up to the standard set by the North Carolina Federal Court. I feel it yet. There is no use in concealing my feelings to the presiding officers of this court—to courts in gen-

eral. No man yields higher respect than I do, and it is hearty; it is not that concealed, groveling, bowing, boot-licking respect that some men who fawn around courts and judges pay; it is a respect which is acknowledged on all occasions, and without fear and without favor; but it is not that spirit which refuses to criticize. And then, when this District for jury service was fixed by the court, and a tremendous population in the control of this defendant, was placed in, with a very meager population not subject to this area of low barometric pressure in which we live, I felt that again this Court had not done what it knew or thought was unjust, but that an error had been committed,—a permanent error had been committed, which would work injustice in all such cases as this. And feeling that, I went into the trial of this case with a clouded spirit, a spirit that however we might strive, not withstanding the fact that a judge of this court had previously held against these unfortunate plaintiffs, and that through great exertion and the expense of hundreds of dollars, they had taken an appeal to a higher court and reversed that erroneous decision, which I think was due to that judge's coming in to this area of low barometric pressure, they would not get justice.

I don't think he would have decided that case that way in Helena. I believe in mental influences that afflict men, that have no known cause, and

even though that appeal had been taken at such terrific delay and tremendous expense, I felt that we again faced a trial that would not be fair though this was the Strangers' Court. And to a man of historic study, a studious life, who looks back upon the period when this nation was young, and it was, as I believe conceived in liberty and justice, and knowing in my heart that the concept of them did not work out as they intended, that this court did not, in my opinion as a lawyer —others may differ from me—realize the ideals of the founders of this Government. It threw a pall upon my soul, for my soul does go into the interests of my clients. Misfortunes for myself I can stand, and have stood. The misfortunes of others go right to my heart, and sear and burn, and that does make me when I realize that their righteous interests are in desperate straits, take desperate measures with the ultimate object of gaining justice. That was the ultimate end here; and if this court is above criticism, if any man in this nation is above criticism, I have greatly offended by this talk. If not—if as a citizen of this nation whose anecstors have sprinkled her early battlefields with their blood,—who hold my lands in Virginia under the Crown Grant of William and Mary, yet, if this nation has come to the point where any man or institution in it is above criticism, your Honor, then I am an offender against its customs and its laws. As to

myself I care little. I don't even care for something that your Honor attributes to me, that I did not know I had,—a reputation for courage, or bravado, I believe your Honor termed it, or something like that. I never knew I had it. I never sought it; I don't care for it; it is nothing to me. I go along—it is hard for me to practice law in a community where the situation is as I deem it to exist here, and as a majority of the lawyers at this bar deem it to exist. I am not the only one, though I may be more open and free in expressing my candid beliefs. You see, I have generations of freedom behind me. Hundreds of years we have been freemen in my native state, and we resent oppression, and I feel it here in this community, and it is not my nature to bow before any man and say he is better than I am. It is my nature to say he is my equal, but not my superior.

I have spoken at some length, your Honor. I did not expect to when I started. This matter was entirely unexpected to me, for the reason that no contempt was meant. If your Honor gained that impression, then it proceeded from something foreign to me, because, as I have asid, I seek this court,—I file my cases here of choice and against this very defendant, and prefer this court to any other court, and my preference has grown greater in the last six or eight months because I expect and receive ampler justice here

than I received before the present incumbent took charge of this court. I am willing to abide by your Honor's decision in this matter. There is but one thing that I request,—that your Honor take this matter under advisement; your Honor suffers somewhat like myself,—from being driven by haste in reaching rapid conclusions. We both have the same failing.

I have concluded, your honor."

And at the conclusion, the court spoke as follows:

The Court:—The Court will say that much, perhaps all, that counsel has said, no one will have any quarrel with. The difficulty is at set out in the Court's preceding statement, that you forgot that the time and place was not the time and place for the sentiments of which you delivered yourself to the jury. If, as you say, you made a motion in this case, or rather, you brought the case in Helena, and it was transferred here, and if, as you say, conditions are all that you claim they are, that does not touch the gist of your offending here. The Court is not disposed to be harsh with you. The Court has, however, considered this carefully and seriously from the time the incident occurred. Considering the standing you have at the bar, and in the community, it is deserving of more note from the Court than it would be if you were a tyro at the bar. You are counsel of years of learning and experience,

> and appreciate that there was an offense to the jury, and to the Court, and an offense to the opposing counsel, and an offense to yourself; and while the Court believes that it might fittingly suspend you for an indefinite period from practice here, it will not do so, but it is the order of the Court that the aforesaid counsel, Mr. H. L. Maury, be fined in the sum of five hundred dollars, and be remanded to the custody of the marshal until such fine is paid, or he is otherwise discharged according to law. If a review hereof is desired in the Appellate Court, on motion, a reasonable stay will be granted for that purpose."

Thereupon Mr. Maury announced that a review would be sought and Mr. Maury said: "And this sentence, your Honor, but confirms—" 12 R. 5, and the court said: "Mr. Maury, be very careful now. You have made your statement, it will be wise for you to not put yourself in a worse position. You have made your statement and the court will not hear further from you."

And thereafter the court entered judgment to the effect that H. Lowndes Maury do pay a fine of $500.00, and be remanded unto the custody of the United States Marshal for the district of Montana until such fine is paid, or he is otherwise discharged according to law. Stay of execution was granted herein.

Thereafter said Maury filed an assignment of errors, 18 R. 19 R. Writ of error was allowed by order.

SPECIFICATION OF ERRORS.

1. The court erred in rendering and entering judgment that H. Lowndes Maury be fined in the sum of five hundred dollars, and remanded to custody until such fine be paid.

2. The evidence is insufficient to sustain the judgment.

ARGUMENT AND AUTHORITIES.

There is, and of necessity must be, in every court of record, power to punish summarily for contempt of the tribunal. No one is more ready heartily to acquiesce in that fundamental necessary rule of national existence than the alleged contemnor in this case, but whenever there be contempt in the presence of the court, then it is the universal custom to do one of two things:

(1) Administer punishment forthwith instantly. One reason why this course is permitted to courts is, there are always impartial persons in court, under the English system of holding courts openly to the public; and they are a check and judge between the alleged contemnor and arbitrary action on the part of the court.

Here the attendants and spectators see the entire occurrence and in this instance we claim that had the court *dum opus fervet* proceeded to administer

punishment his respect for the good opinion of the officers, attendants and spectators would have restrained him from any cruel and unusual punishment. We contend that such is one of the reasons why our system, different from the continental system, requires the proceedings of court to be open to the world. The other method is to cite the alleged contemnor to answer and give him time to order his cause (as Job felt the need of even before the Allwise and Alljust Jehovah). Neither method was pursued here.

The law knows no fractions of a day. It would be deemed (though perhaps unfairly) instant action had the court acted on the same day. Here a trial proceeded to its end and as Maury's remarks to turn on the lights show, the evening of the second day had set in before the court proceeded to convict, and this conviction was made before any evidence, notice, citation, arraignment or trial. The proceedings consisted of the familiar post-verdict-of-guilty, request if the accused (convicted) had anything to say why punishment should not be administered.

We ask how long can the judge carry secreted in his breast the determination to punish? If he can carry it overnight he can carry it for years. If he can carry a fine of five hundred dollars, enough to compel imprisonment of a large percentage of the bar of the union, he can carry a fine of five thousand dollars, enough to imprison ninety-eight per cent. of

the bar of the union. He can enslave that class which De Tocqueville, eighty years ago, in words which seem prophetic, distinguished as the chief guardians of the liberties of the United States. Thus would these guardians of freedom be reduced to servile fear.

Furthermore, he can, if these words are contemptuous (such have never before been deemed so by any court in America, and similar slighting words of juries have been used by the courts themselves frequently) hold any words contemptuous.

Thus our due process of law is reduced to the will of the judge and there is ushered in a new system of cruel and unusual punishments, not against the rabble, nor outcasts, but against men whose sworn duty it is, according to Sharswood, in his work on legal ethics, to sometimes admonish the judge himself that his course is wrong.

The privileges of the bar in the United States have been compared to the tribunitian power in Rome. As members of the bar, we ask, are we to be put in fear of bondage or the strippings of the savings of years because we do our duty as we see it? We say the strippings of the savings of years. Our profession is not wealthy. The court knows of many high minded and useful men in this profession that a fine of five hundred dollars would cripple or imprison.

The need of payment of this fine is not, however, the most serious aspect of it. Such a fine attracts public attention to the fact that the supposed offender must

have been in grave contempt of the most sacred institution of the national life. Thereby it kills the further usefulness of the lawyer before the public and juries drawn from it. To expect further clientage before the judge administering the fine is preposterous.

A man may have given twenty years of unremitting toil to perfect himself morally, mentally, learnedly, for noble work for the public and lucrative employment for himself and his sons after him, and suddenly, when he is about to live in the habitation he has builded with so much toil, to eat the harvest which he has reared, he is doomed to great financial loss, and what is more, the loss of standing before his community and his friends. He is deprived of something far higher than his property without any due process of law, and indirectly, of his lucrative profession.

We assert that never before in the history of the American union has a fine of such an amount been administered by any court for a refined, quiet, gentlemanly expression of any opinion. This fine is unusual to say the least. Its cruelty springs more from the standing attributed by the court to the alleged contemnor than from its need of payment (if affirmed). It is needless to say that the power of Maury in this community where this fine was administered is almost destroyed.

And now let us see what words provoked such a penalty: "I cannot win this case in Silver Bow

County so my questioning will be very particular." Hundreds of thousands of lawyers have gone into the trial of causes in certain localities with absolute knowledge that their sole chance was a disagreement and a new trial in another community. The courts themselves have for a generation or more on thousands of occasions in the United States, spoken of the inability of certain litigants to get fair trials before juries. The case which comes to mind first is the language of the Supreme Court of the United States in Butler v. Frazee, 211 U. S. 465. We quote:

> "That these considerations have had an influence is shown by the notorious unwillingness of juries to apply the rule, etc."

Legislatures have recognized the imperfections of juries. We assert that there is not a state in the union that does not permit a judge, by statute or by common law, to set aside a vedrict of a jury if he is convinced that the verdict proceeds from passion or prejudice or undue influence of any kind. We aver that the trial courts of the federal judiciary have for time immemorial continually granted new trials by reason of the acknowledged imperfections of the jury system. In these matters it is not improper, as we believe, to call attention to the acts of other high minded and respected members of the bar for the purpose of comparison. In the files of this court, in a petition for rehearing filed by a gentleman and a

scholar, than whom, in our northwest country, there is no lawyer who receives higher respect of his community and the members of the bar, the following words appear:

> "Why should the judgment of an experienced and able trial judge, upon uncontradicted testimony, be subordinated to that of twelve ignorant, inexperienced and irresponsible men."
>
> P. 12, Petition for Rehearing, Williams v. Bunker Hill & Sullivan Mining and Concentrating Co.

This very presiding judge has when a nisi prius judge of the state court in the county of Silver Bow, exercised that prerogative often and reduced verdicts in large amounts, reciting that they were the outcome of passion and prejudice, and he has set them aside entirely on the same grounds. He has peremptorily, and in the midst of (not a term because we have a continuous term in this county), but long before he expected to complete the work for a panel, dismissed the panel because it was not answering his judicial ideas. In one instance the jury acquitted a man accused of gambling where the evidence was clear and convincing, and immediately this very presiding judge discharged the panel though there was much business to be attended to. We fail to see why an officer whose duty it is sometimes to charge the judge himself with error, who is permitted under the *federal* laws to

charge the judge himself with bias and prejudice in affidavits, is restricted from, and guilty of flagrant contempt if, he courteously, and in the exercise of what he believes to be his duty, openly tells the subordinate officers of the court, the jury themselves, his own feelings in the matter if those feelings are reasonably justified by the situation, in order to prevent the evil he fears.

We do not say that custom justifies any wrongful act on the part of an advocate, but the fact that the thing has been done before and gone unchallenged by other judges equally mindful of the dignity of their courts is some argument that the offense is not regarded by the judiciary, as a whole, as an offense at all. This same attorney charged with offensive conduct here has stood in the court house of Silver Bow County defending a man of notoriously bad reputation in the community on the charge of murder in the first degree, and put the jurors on their guard by openly saying that he did not believe his client could have a fair trial before them. We say it was ligitimate advocacy. The man, who was innocent in that instance, was entitled to a fair trial in that case regardless of his past offenses or reputation for such offenses, and that very free and candid statement went a long ways towards saving the very life of the man whose previous conduct had been bad, but who was rightfully declared innocent of all crime in the case at bar. We cite this as an illustration.

In support of our argument that Maury should have been permitted an opportunity to introduce evidence we believe it is perfectly legitimate to state a supposed case of what might have been proven. We cannot see why it is necessary, in stating a supposed case, to draw upon the imagination in preference to what might have been proven as actual facts in this case. We are going to state what could have been proven in evidence in complete justification of Maury's position and language as if all the facts were imaginary. The fact is that our supposed case corresponds exactly with the truth.

Suppose that the real party in interest here were the Anaconda Copper Mining Company, substituted by reason of a consolidation, for the defendant Boston and Montana MiningC ompany; suppose that company gave employment in the counties of Silver Bow and Deer Lodge to fifteen thousand men; suppose all other employers of labor combined in the two counties gave employment only to thirty-five hundred men; suppose the jury panel as it stood contained three-fourths from these two counties, one-fourth from other counties in Montana; suppose the only important industries in these two counties were mining and smelting; suppose this company owned great railroad interests, great banking interests, great electric power interests, great mercantile interests in these two counties; suppose that this company with six others, which shall hereafter be mentioned as

being consolidated into this company previous to the date of this trial, had taken great interest in politics of the two counties and of the state; suppose that for ten years preceding this trial an average of forty-five men per year had been killed underground in the mines of this company and the others to be mentioned hereafter; supposing that one hundred and fifty men per year had been grievously injured underground in the mines of this company and its associates for the same period, making in all in the ten years nineteen hundred and fifty deaths or grievous injuries in these mines; and then suppose that Maury stood there conscious of a fact that never, in ten years, had there been against this consolidated company, or against any of its component factors a single, solitary final recovery in a court of law of Montana against any one of them for an injury or death occurring underground (though such cases had been attempted time without number by the ablest men at the bar of Montana); suppose this defendant were so powerful in politics, that openly, at a primary election for delegates to a convention, in one political party forty-seven hundred votes were cast for their representatives, and at the election succeeding, under the Australian ballot system, less than three thousand votes were cast by that entire political party in the county; suppose that there sat upon this jury which Maury was addressing in the opening statement, after all peremptory challenges had been exhausted, a man,

who for many years had been a political leader for this defendant and its associates, a man who had been elected county commissioner of that county of Silver Bow as an ordinary working man without any means, served two terms or more due to the support given him by the defendant for his second term, and came out the owner of a four story building, which was on the day of the trial being occupied by the official newspaper organ of the defendant as his tenant; suppose that man, when more than a dozen indictments had been filed against him for malfeasance in that office, was represented by, and successfully defended (on technical grounds) by one of the attorneys for the defendant in the instant case; suppose there were others upon that jury which are absolutely and as thoroughly within the control of the defendant as this one; and then tell a lawyer to so stultify himself as to expect a unanimous verdict from that jury in favor of a widow and child against that defendant, is to tell a lawyer that he must *lie* in order to preserve the dignity of the court.

But we will go further in our imaginary caes: Suppose the influence of that defendant was so great that even the presiding judge of the court fell such a victim to it as to announce in open court, after having the same testimony that the Circuit Court of Appeals once held was sufficient to take the case to the jury, that the Circuit Courts of Appeals was wrong, and that the case should be non suited. And suppose,

further, to cap the climax of our imaginary case, that Maury's knowledge of this influence was so accurate, as justified by subsequent events, that as part of the *res gestae* of this entire transaction, when the fine was administered one of the attorneys for the defendant (and a good fellow too), stepped over and said to Maury, (a white man, born of free parents), "Wait until the election is over and this will be remitted," as if he were a part of the machinery of the court or something higher, possessing the pardoning power over that court's actions.

The evidence would have shown that this cause was once pending in the state courts; that in order to get away from local influence and to place the stranger's cause before the court established by our fathers for the stranger, on the advice of Maury it was dismissed in the court where local influence was feared, and recommenced in the national court. The evidence would show that the very purpose and reason for doing so was that unanimity of jurors was required in the federal court, and that counsel believed that American citizenship was not so thoroughly debased in the desert of Butte that twelve men could be found to decide against a widow and child where the evidence was as strong as it was in this case.

As to the six companies alluded to as having been previously consolidated with the Anaconda, the names and their strength are even judicially known to some of the members of the Circuit Court of Appeals. They

were the Boston & Montana Consolidated Copper & Silver Mining Company, Butte & Boston Consolidated Mining Company, the Trenton Mining and Developing Company, the Original Consolidated Mining Company, the Washoe Copper Company and the Parrot Silver & Copper Company.

The foregoing facts are fair argument on the question of the right of Maury to put in evidence and to have time to do so

Another fact is relevant and could easily have been shown if time had been allowed: The entire jury were just as Maury considered some of them. They united in a verdict for the defendant and against the plaintiffs after very slight deliberation.

But except for laying a local coloring and setting to the answer which Maury gave the court offhand, after the wear of an exciting trial, they are hardly necessary because the judge himself, when Maury finished, said: "The court will say that much, perhaps all that counsel has said no one will have any quarrel with." 11 R. 1. 'The difficulty is, as set out in the court's preceding statement, that the time and place was not the time and place for the sentiments of which you delivered yourself to the jury."

Here is an admission by the court while the matter burned, of the truth of my statements, and my statements off-hand as they were, without time for preparation, spontaneous, embrace in substance all of the supposed case. And the point at issue here is de-

fined sharply, whether the legal profession in its advocacy of just causes, must act with servile duplicity in the presence of the court and its officers, must lick the hand that strikes them, or rather their clients, whose rights are often dearer to the heart of the advocate than his own, or whether it can, whenever relevant or germane to the case, tell the unvarnished truth.

The foregoing has been written by the contemnor alleged. In writing it, he finds fault with no man on earth. He realizes that the actions of men are due and traceable to two causes alone,—environment and heredity. The said Maury does not claim that if his own parents and grandparents had been servants to man or to commercialism, he would do any otherwise in this community than the vast majority of the other residents herein.

The said Maury has a few words more, and then the remainder of this brief will be written by counsel more able to handle its legal aspect than Maury, and in whose ability, recognized of years of association at the bar of Butte (though they have now moved to larger fields of endeavor in San Francisco) the said Maury has abiding faith.

Another comparison is this: During sixteen years of practice at the bar, during three years of study and association in law offices before being admitted, I, Maury, have time out of mind and repeatedly, heard advocates defending corporations in personal

injury suits in other counties than Silver Bow (and in Silver Bow for corporations not possessed of this local influence), say in the presence of juries, that they realized that there was a prejudice of the twelve men against their clients in such cases. I therefore aver, having seen such custom unchallenged for now these nineteen years, that if this trial had been going on in the city of Helena, and my adversary had made the same remarks for their client that I made in Silver Bow he would have gone unchallenged, for I have never heard a court rebuke such language.

I know the delicacy of my position. I may say something that will put me in worse attitude than the judgment of the District Court put me. If I had been in contempt of the Court, I made the amende honorable as far as regard for the truth would permit. This should have been sufficient.

In re Perkins, 100 Fed. 951;
4 Enc. Pl. & Pr., 795; idem, 791.

While not claiming the fortitude of Bruno, to be burnt before recanting, yet no fine of $500.00 is sufficient to reduce me to Galileo's servile denial of the truth.

I stood for and told the truth as I saw it on *voir dire*. I did the same in my opening statement. I did the same thing when charged. I am doing the same thing now. If the Court thinks me wrong and cannot free me from the odium of this unjust sen-

tence, I can console myself with the thought that from one more severe and more unjust, placed upon me in great poverty and obscurity, I have risen by honorable endeavor to a place in the profession envied by many who scorned me then. I can rise again, and prefer to make the attempt to retreating in this Court, or any other Court, from a position justified by my conscience. If the truth cannot free me I can pay the fine and leave the final determination of the justice of my case to the countless thousands who know my life and that of the judge who imposed it. The foregoing is my work. The remainder is my counsels'.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE JUDGMENT.

"The sole power of the federal courts to punish for contempt of their authority, both at law and in equity, is derived from Rev. St., Sec. 725" (U. S. Comp. St. 1901 p. 583).

> Kirk v. Milwaukee Dust Collector Mfg. Co., 29 Fed. 505.

That section reads as follows:

> "The said court shall have power to impose and administer all necessary oaths, and to punish by fine or imprisonment, at the discretion of the court, contempt of their authority: Provided, that such power to punish contempts shall

not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness or other person, to any lawful writ, process, order, decree, or command of said court."

The first limitation found in the above section is (a) that the punishment shall be limited to fine or imprisonment, (b) *for contempt of their authority.* The second limitation provides, "that such power to punish contempts shall not be construed to extend to any cases except" those specifically mentioned.

"The power of the United States courts in matters of contempt is limited by the provisions of Rev. St. Sec. 725 to punishment by fine or imprisonment."

U. S. v. Atchison T. & S. F. R'y Co., 16 Fed. 853.

"The power of the federal courts is further limited to punish for contempt to cases of misbehavior of any person in the presence of the court, or so near thereto as to obstruct justice, to misbehavior of any officer in official transactions, and to disobedience of any lawful writ."

Ex parte Buskirk, 72 Fed. 14, 18 C. C. A. 410, 25 U. S. App. 613.

"The common law power of federal courts in contempt proceedings is restricted by this section."

"The jurisdiction prescribed by the Act is exclusive and deprives the court of power to punish for any act not enumerated in the statute."

Atwell v. U. S., 162 Fed. 97, 89 C. C. A. 97 reversing 140 Fed. 368.

Cuyler v. Atlantic & N. C. R. Co., 131 Fed. 95.

Ex parte Robinson, 86 U. S. 505, 22 L. Ed. 205-208.

"A proceeding against an attorney as an officer of the court for contempt is a proceeding for a criminal offence, and the guilt of the accused must be proved beyond a reasonable doubt."

In re Cashman, 168 Fed. 1008;

Woodruff v. North Bloomfield Gravel Min. Co., Fed. 129;

Fischer v. Hayes, 6 Fed. 63;

U. S. v. Jose, 63 Fed. 951;

State v. Ralphsnyder, 34 W. Va. 352;

2 Bish. Cr. Law, Sec. 252;

Whart. Cr. Law, Sec. 3426;

Anargyros v. Anargyros & Co., 191 Fed. 208.

THE COURT FAILED TO FIND ANY FACT WHICH CONSTITUTES CONTEMPT OF COURT WITHIN THE MEANING OF THE STATUTE.

The only finding, if it can be called such, in the record herein is found on page 14 of the transcript and is contained in the following language:

"Which language was accompanied by an attitude, demeanor and tone on the part of said H. Loundes Maury the whole of which was thereafter, as herein set out, found by the court to be MISCONDUCT IN OFFICE AS AN ATTORNEY AND COUNSELLOR OF THIS COURT OF AND BY SAID H. LOUNDERS MAURY, AND FUND BY SAID COURT TO CONSTITUTE AND BE CONTEMPT OF THE COURT, COMMITTED IN THE FACE THEREOF.."

Misconduct in office as an attorney and counselor is not one of the grounds designated in the statute as constituting contempt of court. In fact, many acts of misconduct in office by an attorney would not constitute contempt of court at all.

The statute "limits the power of these courts to three classes of cases: 1, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of

justice; 2, where there has been misbehavior of any officer of the courts in his official transactions; and 3, where there has been disobedience or resistance by any officer, party, juror, witness or other person, to any lawful writ, process, order, rule, decree or command of the courts. As thus seen, the power of these courts in the punishment of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments and processes."

Ex parte Robinson, 86 U. S. 505, 22 L. Ed. 205, 208.

The court failed to find that the attorney was guilty of any "misbehavior in its presence, or so near thereto as to obstruct the administration of justice," neither did it find that the attorney was guilty of any "misbehavior as an officer of the court in his official transactions or that he resisted or disobeyed any lawful writ, process, order, decree, or command of said court." Nor is there any finding that that attorney, in any manner, contemned the authority of the court. Neither is there any finding that the attorney intended any disrespect to the court or defiance of its authority. Neither the judgment or the record discloses any criminal intent.

"The offense being criminal in its nature, both the charge, and the finding and judgment of the court

thereon, are to be strictly construed in favor of the accused."

Schwartz v. Superior Court, 11 Cal. 112,34 Pac. Rep. 580,582;

In re Riggsbee, 151 Fed. 701,702;

Reymert v. Smith (Cal. App. 1907), 90 Pac. 470, 5 Cal. App. 280;

"The facts must be stated and findings made before adjudging one guilty of a direct contempt and a failure to make such finding would work a reversal of the judgment and this is the rule even where there is no statute requiring it. The reason is that the reviewing court may see whether or not the facts amount to a contempt."

Hoffman v. Hoffman (S. D.), 127 N. W. 478, 30 L. R. A. (N. S.) 564, and extensive note, and citing Rawson v. Rawson, 35 Ill. Aun. 505; Ex parte Wright, 65 Ind. 504; Ogden v. State, 3 Neb. 886, 93 N. W. 203, and other cases.

"It is essential in proceedings to punish one for contempt committed in the presence of the court that it should affirmatively appear on the face of the record *'with all the certainty of an indictment or information that an offense has been committed.'*"

"Accordingly where the accused was found guilty of using insulting and menacing language to the court during the trial of a case, and the record, while so stating, failed to set out the language used by the

defendant, it was held to be insufficient to sustain a judgment of conviction."

Ogden v. State, supra;
In re McCarty, 154 Cal. 534,98 Pac., 540.

"It is necessary in a contempt proceeding that the facts be set out and filed. It is not enough that the contemnor's acts be set out in the judgment."

In re Odum, 133 N. C. 250, 45 S. E. 569.

"The power of the court to punish for a contempt of its authority, though, undoubted, is in its nature arbitrary, and its exercise is not to be upheld, except under the circumstances and in the manner prescribed by law. It is essential to the validity of proceedings in contempt that they show a case in point of jurisdiction within the provision of the law, and presumptions and intendments are not to be indulged in their support."

Batchelder v. Moore, 42 Cal. 412;

"Contempt of court is a specific criminal offense and strict construction is made in favor of the defendant. It must be governed by the rules of construction applied in criminal cases."

In re Ellerbe, 13 Fed. 530;
Accumulator Co. v. Consol. Electrical Storage Co., 53 Fed. 793; Kirk v. Milwaukee Dust Collector Mfg. Co., 26 Fed. 501.

In the case last above cited the court said: "A direct contempt is a contempt committed in the face of the court, and may consist of noisy or tumultuous conduct in the presence of the court, or so near thereto as to interrupt its proceedings, or an open defiance of its just powers or authority, or any disrespectful behavior or language to the presiding judge, or any improper conduct tending to defeat or impair the administration of justice."

In the case at bar the record failed to show any "noisy or tumultuous conduct," or any "open defiance of the court's just powers or authority," or any 'disrespectful behavior or language or behavior to the presiding judge, or any improper conduct tending to defeat or impair the administration of justice."

"Contempt of court is an offense the essential ingredients of which are disobedience to the court or despising or opposing its authority or dignity. It may consist of disorderly or insolent behavior or language in the actual presence of the court, in willful disobedience to its mandate, in resisting or evading its process, or in assaulting its officer. So, too, using language which is scornful or reproachful, or which tends to diminish the respect for or authority of the court, or which is likely to obstruct the service or execution of its process or orders is contempt.

A contempt is direct where it is the doing of any improper act in the presence of the court while in session tending directly to disturb the proceedings as

for example, noisy or tumultuous conduct on the part of a person present in the court room or tending to defeat, to disturb or to impair the administration of justice, as for example, open defiance of the powers of the court or disrespectful behavior or language to the judge. It may also consist in the refusal to do a proper act required to be done in open court, where the refusal tends to disturb the proceedings or to defeat the interests of justice."

Ferriman v. People, 128 Ill. App. 230;
Ex parte Clark, 208 Mo. 121,106 S. W. 990, 15 L. R. A. (N. S.) 389n;
Stuart v. People, 4 Ill. 395.

"Whilst the power to punish for contempt is thus arbitrary and conclusive, it by no means follows that every act which a court declares to be a contempt is in reality one. The power thus vested in a court is necessarily of an arbitrary nature, and should be used with great prudence and caution. A judge should bear in mind that he is engaged, not so much in vindicating his own character, as in promoting the respect due to the administration of the laws; and this consideration should induce him to receive as satisfactory any reasonable apology for an offender's conduct."

People v. Turner, 1 Cal. 152, 153-154.

It is said by an eminent authority on contempt (Oswald Contempt of court 17-19), quoting English judges:

"It should also be borne in mind, in considering and dealing with contempt of court, that it is an offense sui generis, and that its punishment involves in most cases an exceptional interference with the liberty of the subject, and that too by a method or process which would in no other case be permissible, or even tolerated. It is highly necessary, therefore, in all questions of this nature, where the functions of the court have to be exercised in a summary manner, that the judge in dealing with the alleged offense should not proceed otherwise than with great caution and deliberation, and only in cases where the administration of justice would be hampered by the delay in proceeding in the ordinary course of law; and that when any antecedent process is to be put in motion every prescribed step and rule, however technical, should be carefully taken, observed and insisted upon. The jurisdiction should be exercised the more carefully in view of the fact that the defendant is usually reduced to such a state of humility, in fear of more severe consequences if he shows any recalcitrancy that he is either unable or unwilling to defend himself as he otherwise might have done.

Sir George Jessel, M. R., referred to the matter in the following terms: "It seems to me that this jurisdiction to commit for contempt, being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised,

if I may say so, with the greatest reluctance and the greatest anxiety on the part of the judges, to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. I say that the judge should be most careful to see that the cause cannot be fairly prosecuted to a hearing unless this extreme mode of dealing with persons brought before him on accusations of contempt should be adopted. I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, *it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is if no other pertinent remedy can be found.* Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction.

In dealing with an application to commit the publisher of a newspaper for having published some observations on a case while the trial was pending, which were alleged to tend to prejudice the minds of the public against one of the defendants before the hearing, Cotton, L. J., said: "In my opinion, no application to commit for contempt ought to be made unless the offense was so serious as to render the exercise of this summary jurisdiction necessary to prevent interference with the course of justice, and though there be technically a contempt, I cannot see any such fear or serious

interference with the course of justice or prejudice to the defendant as to justify a court in interfering by this summary and arbitrary process."

Quoting further from the same author at pages 58-59, he states:

"Good feeling should always exist between the Bench and Bar; and when it is interrupted the reason for it may be found to exist on both sides. There is scarcely any instance upon record in a superior court of a conflict between the Bench and Bar becoming so acute as to lead to the commital of the defendant for contempt while conducting his client's cause. Even Jeffreys, C. J., who is said to have browbeaten and sometimes threatened counsel, does not appear to have put his power of committal into force against them.

Speaking upon the same subject, the Supreme Court of West Virginia, in State v. Frew, 24 W. Va., at page 477, say:

"Having thus shown that this court has power to punish for contempt, it must not be overlooked that this power can be justified by necessity alone, and should rarely be exercised, and never, except when the necessity is plain and unmistakable. It is not given for private advantage of the judges who sit in the court, but to preserve to them that respect and regard of which courts cannot be

deprived and maintain their usefulness. It is given that the law may be administered fairly and impartially, uninterrupted by any influence which might affect the rights of the parties or bias the minds of the judges, that the court may command that respect and sanctity so essential to make the law itself respected, and that the streams of justice may be kept pure and uncorrupted.

The public have a profound interest in the good name and fame of their courts of justice, and especially of the courts of last resort. Everything that affects the well being of organized society, the rights of property, and the life and liberty of the citizen is submitted to their final decision. The confidence of the public in the judiciary should not be wantonly impaired.

We know full well that respect of courts or judges cannot be compelled. 'Respect is a voluntary tribute of the people to worth, virtue and intelligence; and, while these are found on the judgment seat, so long and no longer will courts retain the jublic confidence.'

Tested by the rules thus announced, no necessity apears in the record for the exercise by the court of this extraordinary power. The attorney was told by the court to desist from the line of statement which he was making or about to make and he promptly obeyed (R., p. 4). And the jury were instructed

by the court and admonished not to be in any manner influenced by the language of counsel, and they evidently followed the instruction. R., p. 3. So that the rights of no litigant were prejudiced or affected. The attorney's statement that he did "not expect more than a hung jury" and that "he could not win in Silver Bow County or expected that he could not," was simply an expression of his opinion and could not deceive or injure any one. It did not furnish occasion for the exercise of the drastic power of the court to impose a fine of $500 and to order the attorney committed until the amount was paid. The language used by the trial judge clearly shows that he was mistaken as to the nature of the alleged offense, but as to the punishment which it was within his power to summarily administer as well. We have shown in the preceding paragraphs that the power of the court, in contempt proceedings, is limited and restricted by the express provisions of the statute. This is true not only as to the matters which constitute contempt but as to the punishment as well. The judge announced that "while the court believes that it might fittingly suspend you (Maury) for an indefinite period from practice here, it will not do so," etc. R., p. 11. The court has no power to disbar or suspend an attorney for contempt of court in a summary proceeding.

19 Wall (U. S.) 505,22 L. Ed. 205, Ex parte Robinson.

"The court has always held that there is no more important duty than to render such a decree as would serve to vindicate the jurisdiction and authority of the courts to enforce orders or to punish acts of disobedience and that the power is to be sparingly used." "But the very amplitude of the power is a warning to use it with discretion and a command never to exert it where it is not necessary or proper."

Gompers v. Buck Stove & Range Co., 221 U. S. 418,55 L. ed., 797,807.

"Where an attorney is pursuing in good faith what he supposes to be his right in a court of justice he is not guilty of contempt though he falls into error and violates rules of court and statutes not penal, but, to constitute contempt in such cases, there must be something in the circumstances under which it is done that is disrespectful to the court or a hindrance of the administration of the affairs of the court, and the act must be done wilfully and for an illegitimate or improper purpose."

Hunt v. State, 27 Ohio Cir. Ct. Rep. 16.

In order to constitute a contempt of court, there must be some act coupled with an intended disrespect or defiance.

Fishback v. State, 131 Ind. 304,30 N. E. Rep. 1088.

"Hasty expressions made on the trial under the

pressure of excitement have been held not to render the attorney liable."

Rapalje, Contempt, Sec. 29, p. 41;

St. Clair v. Piatt Wright (Ohio) 532.

AN ORDER ADJUDGING A PERSON GUILTY OF CONTEMPT MUST SET OUT THE FACTS UPON WHICH THE ADJUDICATION IS BASED OR IT IS VOID.

People ex rel. Field v. Turner, 1 Cal. 152;;

Ex parte Henshaw, 73 Cal. 486, 15 Pas. Rep. 110;

Crites v. State, 74 Neb. 687,105 N. W. 469;

Ex parte Shortridge, 5 Cal. App. 37-,90 Pac. Rep. 478;

Crites v. State, 74 Neb. 687, 100 N. W. 469;

Alabany City Bank v. Schermerhorn, 9 Paige, 372,38 Am. Dec. 551;

Roncovoni v. Gross, 92 App. Div. 366,86 N. Y. Supp. 1113;

Re Deaton, 105 N. C. 59,11 S. E. 244;

Ex parte Robertson, 27 Tex. App. 634,11 Am. St. Rep. 207, 11 S. W. 669;

State v. Pendergast, 39 Wash. 132,81 Pac. 324;

Ex parte Kearley, 35 Tex. Crim. Rep. 531,34 S. W. 635.

As heretofore shown this is the rule, whether there is any statute requiring this procedure or not. Authorities might be multiplied indefinitely upon this

point. See cases set out in Vol. IV Enc. Pl. & Pr., Supp. p. 382 and in note 799 (3).

THERE IS NO EVIDENCE IN THE RECORD OF A CRIMINAL INTENT ON THE PART OF THE ACCUSED, AND NO FINDING OF SUCH AND THE JUDGMENT IS VOID.

In this kind of contempt, a contemptuous or criminal intent on the part of the accused is one of the essential ingredients.

"Necessity for proving intent. Where the prosecution is for the commission of a criminal contempt, it is necessary for the prosecution to prove a contemptuous intent on the part of the contemnor."

3 Enc'y Evid. 499 and cases cited.

"Accusations of contempt, where of criminal import, must be supported by evidence sufficient to convince the mind of the trier BEYOND A REASONABLE DOUBT OF THE ACTUAL GUILT OF THE ACCUSED, AND TO ESTABLISH EVERY ELEMENT OF THE OFFENSE INCLUDING THE CRIMINAL INTENT."

(U. S. D. C. Mont.) U. S. v. Carroll, 147 Fed. 947.

"The judgment finding one guilty of contempt must show that the publication was made with the intent of

bringing the court into contempt, and the language used must be found and set out."

In re Deaton, 105 N. Car. 59.

In People v. Aitken, 19 Hun. (N. Y.) 327, the court said:

"If the only purpose of the proceeding is to punish the offender and maintain the dignity of the court, the disobedience must be DESIGNED AND WILLFUL, and hence the law terms this a criminal contempt. The willful disobedience expressed in the statute means conduct *intentionally and designedly* at variance with the mandate of the court, the disobedience need not be malicious but it must be in pursuance of an intent to disregard the mandate of the violated order."

"A criminal contempt is one evincing a deliberate purpose to contemn the authority of the court."

In re Rice, 181 Fed. 217.

There are many cases holding: that "Where defendant is not guilty of willful contempt, a nominal fine and costs only will be imposed."

Morse v. Domestic Sewing Machine Co., 38 Fed. 482;

Iowa Barb Steel Wire Co. v. Southern Barbed Wire Co., 30 Fed. 615.

"To constitute a direct contempt of court there must be some disobedience to its order, judgment or process, or some open and *intended* disrespect to the court or

its officers in the presence of the court, or such conduct in or near the court as to interrupt or interfere with its proceedings, or with the administration of justice."

In re Dill (Kas.), 5 Pac. 39,47.

"A proceeding against an attorney as an officer of the court for contempt is a proceeding for a criminal offense, and the same principles of evidence apply as in other criminal trials, and the guilt of the respondent must be proved beyond a reasonable doubt."

State v. Ralphsnyder, 34 W. Va. 352,12 S. E. 721.

THE ORDER OF THE COURT ADJUDGING MR. MAURY GUILTY OF CONTEMPT AND ORDERING HIM TO PAY A FINE IS VOID BECAUSE IT FAILS TO DESIGNATE ANY PERSON TO WHOM SUCH FINE IS TO BE PAID.

"An order of court adjudging a person guilty of contempt and ordering him to pay a fine, which does not state the person to whom such fine is to be paid, is void."

Smith v. Tenny, 62 Ill. App. 571,576;

McDonald v. People, 86 Ill. App. 558,560;

The Albany City Bank v. Schermerhorn, 9 Paige, 372.

In the case first above cited under this point, the court at page 576, said: 'Who is the money to be

paid to? To the complainants, to the clerk of the court? The answer cannot be found by the order. This is not like a case of an order that is irregular or erroneous in part and should, therefore, be obeyed to the extent of its susceptibility of performance, and as to the remainder, reliance be placed upon the court to modify the order as in Tolman v. Jones, 114 Ill. 147, but it is defective in that it is wholly incapable of performance for want of a person to pay to. In such a case it is not incumbent upon the person ordered to pay to apply to the court to make the order an effective one as against himself."

All precedents for such an order, with which we are acquainted, require the person to whom payment is to be made shall be named.

2 Beach Mod. Eq. Pr. 1334-5;
Stimpson v. Putnam, 41 Vt. 238, 243, 244;
3 Dan. Ch. (Star page) 2137, et seq.

THE ORDER OF THE COURT REMANDING THE ATTORNEY INTO THE CUSTODY OF THE UNITED STATES MARSHAL FOR THE DISTRICT OF MONTANA UNTIL SAID FINE IS PAID OR HE IS OTHERWISE DISCHARGED ACCORDING TO LAW IS VOID BECAUSE THERE IS NO FINDING THAT HE IS ABLE TO PAY.

Ex parte Silvia, 123 Cal. 293,55 Pac. Pep. 988;

It is said in the case last above cited: "Every court being in contempt proceedings, a court of limited jurisdiction, it is essential to the validity of a jugment directing the imprisonment of a person until he complies with an order of court that it be *found that he is able to comply.*"

See also In re Cowden, 139 Cal. 144, 73 Pac. Rep. 156 and cases cited.

The order complained of fixes no time or duration for the imprisonment of the alleged contemnor in case of his inability to pay and for aught that appears, it might continue forever.

"Imprisonment under final commitment for a criminal offense, and its duration should be as certainly defined as that for a sentence for any other crime."

Ex parte Maulsby, 13 Md. 625;
Williamson's case, 26 Pa. St. 9.

"The remarks of the judge are no part of the record."

State ex rel Grice v. District Court, 37 Mont. 590,97 P. 1032-3.

The very object sought to be attained, would be entirely defeated if judgments of this character were allowed to stand. No self-respecting attorney would feel safe to enter upon the trial of a case, lest in the excitement of the trial, he might make some trivial or improper remark or gesture, which would land him in jail for the remainder of his life unless he should be fortunate enough to have $500 at his command. He might find himself penniless as a result of some word or phrase inadvertently or indiscreetly uttered in the heat of oral argument. The office of an attorney at law is said to be an honorable one and if it continues such, some freedom of action must be allowed him in the presentation of his client's cause and in the assertion of what he honestly believes to be his rights. An attorney who would refrain from proceeding, where he was acting in good faith upon an honest belief that such action was necessary to preserve his client's interests or to maintain his own rights, through fear of consequence, either in the way of disfavor upon the part of the judge or punishment by way of fine and imprisonment, would and ought to be branded as a craven and a poltroon and he would be quite unworthy of his commission as a member of the bar. He would

be recreant to the honorable traditions of the Bar of England and America and which always have been in the van in every movement and effort to resist the tyrannical exercise of arbitrary power by government or its agents.

For the reasons given and under the authorities hereinbefore cited, it is respectfully submitted that the judgment of the court herein is erroneous and should be set aside.

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H. LOWNDES MAURY,

Attorneys for Alleged Contemner.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Contempt of
H. LOWNDES MAURY,
Contemnor.

H. LOWNDES MAURY,
Plaintiff in Error,

vs. No. 2205.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY, a Corporation, and THE UNITED STATES OF AMERICA,
Defendants in Error.

BRIEF AND STATEMENT OF DEFENDANT IN ERROR, BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY.

In the main action out of which the above entitled matter arose, the original defendant was the Boston and Montana Consolidated Copper and Silver Mining

Company, a corporation. About December, 1910, the Anaconda Copper Mining Company assumed all of the obligations of the defendant Boston and Montana Consolidated Copper and Silver Mining Company, including any liability to plaintiff in this action, and it was stipulated and agreed in writing by counsel for the respective parties, which stipulation was filed in this action in the court below, that the Anaconda Copper Mining Company should be substituted as party defendant in the place and stead of the said Boston and Montana Consolidated Copper and Silver Mining Company. We cannot learn that any formal order of substitution was made, but since the filing of said stipulation, the Anaconda Copper Mining Company has been the real party in interest as defendant, and while the proceedings in defense of the action have been conducted in the name of the Boston and Montana Consolidated Copper and Silver Mining Company, they have been carried on in the interest of the real defendant, the Anaconda Copper Mining Company.

In all of the proceedings had upon appeal to this court by Mr. H. Lowndes Maury from the judgment of contempt entered against him in this action, the defendant Boston and Montana Consolidated Copper and Silver Mining Company has been treated as a party to the proceeding, and citation, copy of record and copy of the brief on behalf of Mr. Maury have been served upon the attorneys for the defendant in the cause. This appearance is made and brief filed in

the name of the Boston and Montana Consolidated Copper and Silver Mining Company, but the appearance is in fact for the real party in interest, the Anaconda Copper Mining Company.

Neither the Boston and Montana Company, nor the Anaconda Company, so called for convenience, has any interest whatsoever in the matter of the contempt of Mr. Maury, to review the proceedings upon which, this appeal is taken.

However, in the brief filed on behalf of the contemnor, Mr. Maury, counsel have seen fit to incorporate a statement of alleged facts which are outside of the record, are immaterial, and have no bearing upon the question of the righteousness or unrighteousness of the judgment in contempt entered, but could only serve the purpose of attempting to prejudice the Boston and Montana Company or the Anaconda Company and their rights in this action. Such statements of fact, if true, reflect most seriously, not alone upon the corporations but upon their counsel who appeared for them in the action. For such reasons, and in particular in view of the fact that we have not had and will not directly or indirectly have any participation in the proceedings upon this appeal upon the merits, and know nothing of the defense of the judgment in contempt entered in the court below which will be presented, and as all of the statements of fact above referred to are and were entirely immaterial to the question of contempt to be considered by the court,

the counsel who may appear for said court or judge may not deem it material or necessary for them to controvert or make any reference to these statements; counsel for the said corporations feel that such statements should not pass unchallenged upon this record and that they should be permitted to present this brief and statement as a simple matter of justice.

There is no justification whatsoever for incorporating the matters complained of by us in counsel's brief; whether true or false, they could have no bearing whatsoever upon the question of whether or not the contemnor was guilty of contempt of court, and have no place upon this record. The palpable subterfuge, by which they are introduced upon this record, is found in the statement of contemnor that such facts could have been proven if the contemnor had been given an opportunity so to do in the lower court. The excuse attempted to be given in contemnor's brief for interjecting these matters is found in the following paragraph on page 22 thereof:

> "In support of our argument that Maury should have been permitted an opportunity to introduce evidence we believe it is perfectly legitimate to state a supposed case of what might have been proven. We cannot see why it is necessary, in stating a supposed case, to draw upon the imagination in preference to what might have been proven as actual facts in this case. We are going to state what could have been proven in evidence in complete justification of Maury's position and

> language as if all the facts were imaginary. The fact is that our supposed case corresponds exactly with the truth."

And in the following paragraph on page 26:

> "The foregoing facts are fair argument on the question of the right of Maury to put in evidence and to have time to do so."

The inference attempted to be given by these statements in the brief, that is, that the contemnor Maury sought or asked an opportunity to introduce evidence, either before the passing upon him of the judgment of contempt or at any stage of the proceedings which led up to said contempt judgment or afterwards, is untrue and unjustified upon the record and the record absolutely shows the contrary. When Mr. Maury was called upon by the court to show cause why he should not be punished for contempt (Tr. pps. 6-10), he made a statement, but made no reference whatsoever to any desire to introduce evidence, and the only request made by him was in connection with his suggestion that the honorable judge of the District Court was in the habit of erring through being driven by haste in reaching rapid conclusions, the request being that the judge take the matter under advisement before passing judgment (Tr. page 10, subd. 10). The said facts which counsel suppose may be considered as having been proven in the lower court plainly would have no bearing whatsoever upon the question of con-

temnor's guilt, but the incorporation of such libelous statements in counsel's brief upon this appeal is entirely unjustified from every standpoint; the facts were not before the lower court, no attempt or request of the lower court to prove them was made, and as we shall show the statements are untrue and could not have been established by evidence in the lower court if counsel had been given an opportunity to do so and the evidence had been regarded by the lower court as in any wise material.

These statements, which are found upon pages 22-25 of contemnor's brief, as to the number of men employed by the defendant companies in Silver Bow and Deer Lodge counties, the comparative number of men employed by other employers, the statement of the interests of the defendant companies in these two counties, and particularly of the facts tending to show dominance of business and industrial interests in these two counties by either or both of the defendant corporations, their activity in politics, the statement of the number of men killed or injured by those corporations, the statement of the history of litigations against those corporations in the Montana courts and regarding the political primary incident are each and all untrue, both literally and in substance.

The statement regarding one particular man upon the jury in this action, particularly in so far as they refer to the defendants, or any connection or relation of theirs with him, and in the main the statements

on the whole, and any statement that this man or any other member of the jury was absolutely or thoroughly or at all within the control or influence of the defendants or either of the corporations whom we represent, are absolutely untrue. At the time of the making of the second statement by the contemnor which was held by the lower court to be contemptuous, the jurors had been fully examined, the jury selected and sworn; thus the record in this case absolutely precludes any possibility of this condition existing as to any juror, and during the trial no attempt was made to show such a condition in the lower court and no evidence could have been produced establishing such condition. If contemnor had or has knowledge or information sufficient to justify his incorporating these statements as to members of the jury in his brief before this Court, how can he justify his acceptance of the jury without calling the attention of the lower court to such facts, upon examination of the jurors, or by offer of proof, or otherwise, and can there be any doubt but that contemnor would have done so, if there had been the slightest foundation in fact for these charges?

The statement that the presiding judge of the court below announced in open court that the decision of this court to the effect that similar testimony was sufficient to take the case to the jury was wrong or that the case should be non-suited, is also an absolute departure from the fact. The court made no such

remark or intimation but promptly overruled defendant's motions and sent the case to the jury. The statement upon page 26 of contemnor's brief, that the lower court, in his remark, that there was no quarrel with much or perhaps all of the contemnor's statement at the time of the rendering of the sentence of contempt, admitted the truth of any of these charges in contemnor's brief, is equally surprising and unfounded. In the first place contemnor did not in the lower court make any statement of fact along the lines gone into in this portion of his brief, but simply tried to excuse his conduct by stating his belief and feeling. In the second place, it is plain from the remarks of the presiding judge, that the court did not intend to be understood as expressing an opinion upon the correctness or incorrectness of the statements of contemnor, but simply indicated that the time and place chosen by contemnor was not the proper time or place for any controversy as to such matters. It is almost inconceivable that contemnor or his counsel realize that by placing such interpretation upon the court's remarks, they are charging that the Honorable Presiding Judge below, with full knowledge and appreciation of the fact that plaintiffs could not have a fair and impartial trial in Silver Bow County, and particularly before the jury then empanelled, yet required or permitted such trial to proceed.

The statement upon page 25 of counsel's brief to the effect that any attorney for the defendant or any-

one else to the knowledge of any attorney for the defendant said to the said Maury "Wait until the election is over and this will be remitted," is untrue. No attorney for the defendant made any such statement or any statement which could have been understood by any person of ordinary intelligence to this effect, nor was any statement made to the said Maury by any attorney for the defendant which would justify this statement or the reference to it in counsel's brief. In short, we challenge, as untrue, each and every statement of contemnor, or his counsel, found either upon the record or brief, stating or insinuating that there is or has been any condition or fact, which prevented or would in any wise tend to prevent the plaintiff from having an absolutely fair trial in this action.

It is true, as stated in contemnor's brief, that the jury returned a unanimous verdict for defendant, and it is also true that this jury, which occupied more than five hours and returned for further instructions before rendering its verdict, had among its members six residing in localities far removed from the Cities of Butte and Anaconda, and from any possible influence of the defendant corporation.

Such charges, as those above referred to in counsel's brief, defendant and its counsel are now ready and have at all times been ready to meet by evidence at any time or place. In fact those charges, as shown by the statement of contemnor, at the time the contempt sentence was passed (Trans. p. 9) have been definitely made and judicially determined to be un-

founded in this very action. Under the practice in the Circuit Court for the District of Montana, it was the practice and is the practice of the District Court now to hold terms of court at the City of Butte in Silver Bow County, and also at the City of Helena, in Lewis and Clark County, Montana; it was then and is yet the practice to file in the first place and afterwards to have tried at Butte the cases which originate in Silver Bow County or adjoining counties. This action should have been filed in Silver Bow County, all of the parties residing there and the accident complained of having occurred there, but Mr. Maury, counsel for the plaintiff, filed the same at Helena. The defendant Boston and Montana Company made a motion to the court to transfer the cause to Silver Bow County for trial, and in opposition to this motion, plaintiff, through her counsel Mr. Maury, filed numerous affidavits, making the same charge of domination and undue influence on the part of the defendant corporation in Silver Bow County, and endeavored to prove the same, necessarily producing all the evidence possible of being produced, and went fully into the charge that because of substantially the same matters which are set up in this brief, the plaintiff could not have a fair trial in Silver Bow County. The defendant corporation, the Boston and Montana Company, met this charge and filed affidavits and introduced other evidence and the matter was fully heard and determined in said Circuit Court, Hon. William H. Hunt, Judge presiding. At the conclusion of the hearing the judge

rendered his decision, finding such charges to be unfounded, and ordered the case transferred to Sliver Bow County for trial. A copy of this order, so entered, is as follows:

"In the Circuit Court of the United States, Ninth Circuit District of Montana.

31st day of April Term, 1909. Thursday, June 17th, 1909. In open court.

No. 906, Myrtle Northam and Hedley Northam, Plaintiffs,

vs.

Boston and Montana Copper and Silver Mining Co., a Corporation, Defendant.

This cause, heretofore submitted to the court upon motion of defendant to transfer said cause from records at Helena, Montana, to records of Butte, Montana, came on regularly at this time for the decision of the court, and after due consideration, it is ordered that said motion be granted and cause ordered transferred. Exception of plaintiff to said ruling noticed.

Entered in open court, June 17th, 1909.

Geo. W. Sproule, Clerk.

Attest:

A true copy of order:

Geo. W. Sproule, Clerk.

By C. R. Garlow,

Deputy Clerk."

(Seal)

This matter was heard and determined long before the first trial of the case, the proceedings upon which trial were by this court reviewed upon the former appeal.

If there were conditions existing in Silver Bow or the adjoining counties, which even approached in any degree the situation stated by counsel upon pages 22-25 of their brief, it is impossible to conceive that any court would require litigants against the defendant corporations to try their causes there, and the fact that in this and other causes trials have been proceeded with against the defendant corporations in Silver Bow County, is of itself sufficient to show the unjustifiable character of those statements, but in the present case their interjection into contemnor's brief is further condemned by the fact that there has been in this action, in a proceeding had in the proper way, a judicial determination to the contrary, and we cannot permit to pass unchallenged the attempt of the contemnor to justify through the insertion in his brief of these extraneous and untrue statements, the unethical, unprofessional and unjustified attempt of contemnor to influence the jury upon the trial in the above action by remarks which the lower court of its own motion found to be contemptuous. As to the view that should fairly be taken of the conduct of an attorney, who would deliberately and inexcusably insult the lower court and the members of the trial jury, all other courts of Silver Bow County, the citizenship

of the residents of Silver Bow and Deer Lodge Counties, and defendants and their counsel, as contemnor has done by inserting such statements in his brief, we have no comment to offer.

We respectfully ask the court to consider this brief as it is presented, not for the purpose of affecting in any way the decision of this court upon the merits of contemnor's appeal, but simply for the purpose of righting an injustice attempted to be done the defendant corporations and their counsel upon this record.

Respectfully submitted.

C. F. KELLEY,
L. O. EVANS,
W. B. RODGERS and
D. GAY STIVERS,

Attorneys for Boston and Montana Consolidated Copper and Silver Mining Company and the Anaconda Copper Mining Company, substituted defendant.